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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
L. C. RUSSELL.
No. 143.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

NATURE OF PROCEEDING.

The case comes here by direct writ of error under the criminal appeals act of March 2, 1907 (c. 2564, 34 Stat. 1246), on the ground that the court, in sustaining a demurrer to the indictment, based its decision on the construction of section 135 of the Criminal Code. The district judge certified (R. 8, 9) that no question of the interpretation of the indictment was involved.

STATUTE.

Section 135, Criminal Code, provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate,

> or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

INDICTMENT.

The indictment (R. 1–3) alleged that one William D. Russell had been summoned, as the defendant knew, to attend as a petit juror of the United States District Court for the Northern District of Illinois on April 3, 1918, at a time when the trial of a criminal prosecution against William D. Haywood and others was to begin in said court. With intent corruptly to induce William D. Russell to favor the acquittal of William D. Haywood and others, the defendant, on April 1, 1918, called at the home of William D. Russell, where he saw said Russell's wife, and in the course of his conversation with her, he told her—

> that he represented said William D. Haywood and his codefendants and requested her to question her husband as to his attitude towards

> said William D. Haywood and his codefendants in the matter of the charges contained in said indictment and report the result of such questioning to him, the said L. C. Russell, because, as said L. C. Russell then and there stated to said Lucy Russell, they (meaning said William D. Haywood and his codefendants) did not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal; * * *

In the first count of the indictment this action of the defendant is charged as a corrupt "endeavor to influence" the juror in violation of the first clause of section 135, Criminal Code. In the second count it is charged that by said action the defendant did corruptly influence, obstruct, and impede the due administration of justice in said District Court, in violation of the latter clause of section 135, Criminal Code.

ASSIGNMENT OF ERROR.

The error assigned (R. 13, 14) is that the lower court—

> erred in the decision and judgment sustaining the demurrer to the indictment in said cause, and to each count thereof, based upon a construction of the statute upon which the indictment was founded, in holding that there was no statute of the United States making the matters charged in the indictment a crime.

ARGUMENT.

The record does not show that the judge was of opinion that the facts charged in the first count of the indictment merely showed *preparation* for the

committing of the offense there charged; but, anticipating that counsel for the defendant in error will make the same points which he made in the court below, we proceed to comment upon the distinction between "endeavor" and "preparation," to maintain that the facts in this case show something more than mere preparation, and to comment upon other questions likely to be presented.

If the charge had been that defendant attempted to *bribe* the juror (not, by the way, an offense under any statute), the act of going to the wife and urging her as his agent to ascertain how the juror, her husband, felt toward the persons to be tried by the juror would perhaps be only preparation for bribing. But the charge in the first count, following the statute, was that defendant, by making the statements and request specified, *endeavored to influence* the juror.

The charge in the second count was that defendant, by doing the things specified in the first count, did influence, obstruct, and impede the due administration of justice in the court.

We contend, as to the first question, that whether the actions of defendant, charged in the indictment, amounted to an endeavor to influence the juror or not, was a question to be decided by a jury, and not a question to be disposed of finally on demurrer.

The jury was the proper body to judge, from the appearance of the wife on the stand, whether or not she was an innocent agent of defendant, and how

inevitable it was that she would do as defendant requested her to do; and so the jury should have been allowed to hear the evidence in support of the charge, and to decide whether defendant endeavored to influence the juror by doing what he did, or influenced, impeded, or obstructed justice; or whether defendant was only preparing to do these things.

Of course it is plain from the indictment (R. 2) that defendant's request to the wife to ascertain how her husband felt toward the persons on trial was a mere pretense. This appears from the fact that defendant said that his reason for wanting this information was that the persons on trial "did not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal." This was obviously defendant's way of conveying an offer of money to the juror *to* favor the persons to be tried. The indictment charges that in doing this he endeavored to influence the juror.

If the juror was already favorable to the persons on trial, it would not be necessary to pay him to be so. The fact that money was mentioned shows that defendant wanted to influence the juror by talk of money, whether or not he really intended to pay the juror anything.

We contend that the court could not say in advance of the trial that the juror could not be influenced in this way; and that as such conduct as that of defendant described in the indictment could have no lawful excuse, the court should have held

"the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes" in passing upon the question whether "preparation," on the one hand, or "endeavor," on the other, was disclosed by the allegations of the indictment. The words just quoted are from the opinion of Chief Justice Holmes in *Commonwealth* v. *Kennedy* (170 Mass. 18), hereinafter quoted at length.

Of course the first count, as was necessary in charging an endeavor, which is no other than an attempt, did not show completion of the offense.

Bishop, in Vol. I of his *New Criminal Law*, shows what "attempt" and "endeavor" are.

> SECTION 435. 1. *Attempt.*—Whenever a man intending to commit a particular crime, does an act toward it, but is interrupted or some accident intervenes so that he fails to accomplish what he meant, he is still punishable. This is called a criminal attempt. And by this name "attempt" the language of our American law designates every indictable act of the like sort. But—
>
> 2. *Endeavor short of attempt.*—The English courts refine more nicely. They appear to term an act toward doing the criminal thing an attempt only when it is closely proximate to the substantive crime meant. But they will sustain a common-law indictment for an "endeavor" not thus proximate, while our courts will do the same, but call it an "attempt."

> SECTION 436. *Magnitude of the act—Proximity.*—Our law in the criminal department, the same as in the civil, does not take cognizance of things trifling and small. Two questions concerning the act are always to be considered together—first, whether it is of the sort which the criminal law takes cognizance of; secondly, whether, being such, it has proceeded far enough for the law's notice. And it must go more or less far—be nearer or less near to the end meant—according as it is more or less intensely criminal in its nature.

In *People* v. *Murray* (14 Calif. 159, 160), Chief Justice Field said:

> The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made. To illustrate: a party may purchase and load a gun with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt.

Although the decisions have since clarified the matter to some extent, there still exists difficulty of the kind pointed out by Judge Deady when he said:

> It is said that the subject of attempt to commit a crime is "less understood by the courts" and "more obscure in the textbooks" than any other branch of the criminal law. (Bish. Crim. Law, sec. 657.) And certainly

> there is none in some respects more intricate and difficult of comprehension. It is almost impossible to comprehend all cases of attempt in a definition that does not necessarily run into a mere enumeration of instances. It is easy to say that there must be a combination of intent and act—an intent to commit a crime and an act done in pursuance of such intent, which falls short of the thing intended. (*United States* v. *Stephens*, 12 Fed. 52, 54.)

We submit that the law of our case is well stated in the language of Chief Justice Holmes in *Commonwealth* v. *Peaslee* (177 Mass. 267):

> Obviously new considerations come in when further acts on the part of the person who has taken the first steps are necessary before the substantive crime can come to pass. In this class of cases there is still a chance that the would-be criminal may change his mind. In strictness, such first steps can not be described as an attempt, because that word suggests an act seemingly sufficient to accomplish the end, and has been supposed to have no other meaning. (*People* v. *Murray*, 14 Calif. 159, 160.) That an overt act, although coupled with an intent to commit the crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the

> act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime. As was observed in a recent case, the degree of proximity held sufficient may vary with circumstances, including, among other things, the apprehension which the particular crime is calculated to excite. (*Com.* v. *Kennedy*, 170 Mass. 18, 22; 48 N. E. 770. See, also, *Com.* v. *Willard*, 22 Pick. 476.) A few instances of liability of this sort are mentioned on the page cited.

The matter is further developed by Chief Justice Holmes in delivering the opinion of the same court in the case of *Commonwealth* v. *Kennedy* (170 Mass. 18, 22), cited in the *Peaslee case:*

> Notwithstanding Pub. St. c. 210, section 8, we assume that an act may be done which is expected and intended to accomplish a crime, which is not near enough to the result to constitute an attempt to commit it, as in the classic instance of shooting at a post supposed to be a man. As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. But, on the other hand, irrespective of the statute, it is not necessary that the act should be such as inevitably to accomplish the crime by the operation of natural forces but for some casual and unexpected interference. It is none the less an attempt to shoot a man that the pistol which is fired at his head was not aimed straight, and therefore, in the course of

nature, could not hit him. Usually, acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd. In this case the acts are alleged to have been done with intent that Learoyd should swallow the poison, and, by implication, with intent to kill him. (See *Com.* v. *Adams*, 127 Mass. 15, 17.) Intent imports contemplation, and more or less expectation, of the intended end as the result of the act alleged. If it appeared in the count, as it did in the evidence, that the habits of Learoyd and the other circumstances were such that the defendant's expectation that he would use the cup and swallow the poison was well grounded, there could be no doubt that the defendant's acts were near enough to the intended swallowing of the poison, and, if the dose was large enough to kill, that they were near enough to the accomplishment of the murder. But the grounds of the defendant's expectation are not alleged, and the strongest argument for the defense, as it seems to us, would be that, so far as this count goes, his expectation may have been unfounded and unreasonable. But, in view of the nature of the crime, and the ordinary course of events, we are of opinion that enough is alleged when the defendant's intent is shown. The cup belonged to Learoyd, and the defendant expected that he would use it. To allow him immunity on the ground that this part of his expectation was ill grounded would be as unreasonable as to let a culprit off because he was not warranted in thinking that

his pistol was pointed at the man he tried to shoot. A more important point is that it is not alleged in terms that the dose was large enough to kill, unless we take judicial notice of the probable effect of a teaspoonful of Rough on Rats; and this may be likened to the case of firing a pistol supposed to be loaded with ball, but in fact not so, or to administering an innocent substance supposing it to be poison (*State* v. *Swails*, 8 Ind. 524, and note; *State* v. *Clarissa*, 11 Ala. 57). There is a difference between the case of an attempt and a murder. In the latter case the event shows the dose to have been sufficient, without an express allegation. But we are of opinion that this objection can not be maintained. Every question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help. Any unlawful application of poison is an evil which threatens death according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes. But analogy does not require this consideration. The case cited as to firing a pistol not loaded with ball has been qualified, at least, by a later decision (*Kunkle* v. *State*, 32 Ind. 220, 229) a case of shooting with shot too small to kill. And even in less serious crimes, especially in view of Pub.

St. c. 210, section 8, impossibility of achievement is not necessarily a defense. For instance, in an attempt to procure an abortion upon a woman not pregnant. (*Com.* v. *Taylor*, 132 Mass. 261; *Com.* v. *Tibbetts*, 157 Mass. 519, 32 N. E. 910.) So in an attempt to pick a pocket which is empty. (*Com.* v. *McDonald*, 5 Cush. 365. See, also, *Com.* v. *Jacobs*, 9 Allen, 274.) In the case of crimes exceptionally dealt with or greatly feared, acts have been punished which were not even expected to effect the substantive evil unless followed by other criminal acts; e. g., in the case of treason (Fost. Crown Law, 196; *Rex.* v. *Cowper* 5 Mod. 206), or in that of pursuit by a negro with intent to commit rape (*Lewis* v. *State*, 35 Ala. 380). A familiar statutory illustration of this class is to be found in the enactments with regard to having counterfeit bills in one's possession with intent to pass them (Pub. St. c. 204, section 8; see *Roberts' case*, Dears. Crown Cas. 539, 550, 551); and one which is interesting historically in the English statutes intended to keep secret the machinery used in modern manufacture (14 Geo. III. c. 71, section 5; 21 Geo. III c. 37, section 6). The general provision of Pub. St. c. 210, section 8, already referred to, long has been on the books. A case having some bearing on the present is *State* v. *Glover* (27 G. C. 602; 4 S. E. 564). For these reasons we are of opinion that the motion to quash the second count was properly overruled.

Applying the language of the opinions just quoted to the case before us, we contend that it may well be that defendant did not have the courage to talk to the juror himself but chose to talk to the juror's wife expecting her to put the matter to her husband as a necessary and inevitable consequence of the existing relation of husband and wife, and that there was nothing impossible or absurd in defendant's expectation. We contend, also, that defendant really made the proposal to the juror himself, because he used an innocent agent. (*Com.* v. *Hill*, 11 Mass. 135, 136.) At any rate we insist that, because in all human probability what defendant said to the wife would be repeated to the husband, the acts of defendant well constituted an endeavor to influence the husband because of the nearness of the act to the accomplishment of the purpose of defendant.

Note that in the *Peaslee case* above quoted, Chief Justice Holmes (page 56) said that the ground upon which the decision in *People* v. *Murray* was put was too broad.

This court, speaking by Mr. Justice Thompson, in a case upon a statute making it an offense to attempt to fit out and arm any ship with intent that it should be used in foreign service in committing hostilities against a friendly power, said, in answering the contention that there was no offense unless the proof showed arming as well as fitting out (italics ours):

> But an attempt to fit out "and" arm is made an offense; this is certainly doing something short of a complete fitting out and arm-

> ing. To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or *any definite progress toward it; any effort* or *endeavor to effect it, will satisfy the terms of the law.* (*United States* v. *Quincy*, 6 Peters 443,464.)

The second question is whether the count charging the impeding of justice was good. We contend that the question whether defendant's conduct did impede justice was also for the jury, because it is conceivable that it might have done so as a matter of fact. Who can say that it was impossible?

Suppose that the juror, when his wife, as she naturally would, told him what defendant had said to her, reported the matter to the trial judge, or told about it when asked upon his *voir dire* whether anybody had talked to him about the case, or whether he knew of anything which would make it improper for him to act as a juror; and that thereupon the judge had instituted an investigation in court to ascertain what truth there was in the statement of defendant to the juror's wife that he represented the persons on trial, and whether those persons or their attorneys were making it a practice to approach the jurors, and whether, if so, the whole panel should not be discharged; or that the judge discharged the juror anyway because of what had happened, when he might otherwise have been a good juror; would not this have been an obstruction and delay to the due administration of justice? We think it would have been, and that it was for the jury to decide whether it did have the effect charged.

In the case of *United States* v. *Bittinger* (D. C., W. Dist. Mo., Krekel, D. J.), Fed. Cas. No. 14598, the indictment contained counts drawn upon the same provisions of law as was the indictment in the case at bar, the underlying fact being that defendant, by secreting a witness so as to prevent service of a subpœna upon him, endeavored to influence the witness and obstructed justice. The court left the whole matter to the jury, telling them, however, that on the second charge the *proof* should show something besides the secreting of the witness as a means of obstructing justice. The jury found defendant guilty on all counts. We think the court was right in leaving the matter to the jury, but do not agree with his suggestion that secreting a witness would not obstruct justice in the court.

Suppose defendant, in the case at bar, by approaching the juror's wife as he did, tried to get rid of the juror without using a peremptory challenge, or suppose his aim was by this means to procure the discharge of the whole panel, could the court say that such conduct could not "influence, obstruct, and impede the due administration of justice" in the court? We think the court should have permitted the prosecution to prove the charge.

In this connection it should be remembered that the trial in question took place before one district judge while the case of defendant in error came up before another, and that this latter judge could not know of his own knowledge that there was no such delay as that suggested above.

It should be particularly borne in mind that section 135, Criminal Code, on analysis, shows that Congress intended—on account of the serious nature of the offense and its effect on the public welfare—to punish in their early stages acts tending to interfere with or impede justice. There is nothing strange in this. In *Swift & Co.* v. *United States* (196 U. S. 375, 396), the court said, in reference to attempts to monopolize interstate commerce:

> The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to procure a dangerous probability that it will happen. (*Commonwealth* v. *Peaslee*, 177 Mass. 267, 272.) *But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.* [Italics ours.]

Statutes have in other exceptional cases made mere preparation for a crime a substantive offense, as, e. g., the possession of dies for counterfeiting. Attempts to bribe have always at the common law taken their start at an early point in the series of acts effecting

the completed offenses. In *Rex* v. *Vaughan* (1769), 4 Burrows, 2494, a letter which offered to leave security in the hands of a third person for the payment of a sum of money to the person who should procure a certain patent was held an attempt to bribe, although further acts by the defendant himself were necessary to complete the offense—that is, there was a *locus poenatentiae*. Lord Mansfield said:

> A terrible consequence would result to the public if everything that such an officer is concerned in advising the disposal of should be set up to sale.

And Justice Yates said:

> If it be but questionable, it ought to be inquired into. 'Tis a matter fit for inquiry.

To the same effect are *Rex* v. *Plympton* (2 Lord Raymond, 1377); *Rex* v. *Isherwood* (2 Lord Kenyon, 202); *Rex* v. *Gurney* (10 Cox C. C. 550); *State* v. *Ellis* (33 New Jersey Law, 102).

In *United States* v. *Worrall* (1798), 2 Dallas, 384; *Wharton's State Trials*, 139, the *mailing* of a letter offering to share the profits of a certain contract, if awarded, with the Commissioner of Internal Revenue was held (in effect) an attempt to bribe, though the prosecution should not have been entertained for lack of a Federal statute creating the offense.

It thus appears that when there is a question of the corrupt interference with public officials—and especially of justice—the law, on account of the necessity of keeping such matters, as far as possible, beyond even suspicion, starts at an earlier point in

actions tending toward the evil result than it does in the case of offenses less dangerous to the public generally, less liable to affect the sources themselves of public administration.

It is therefore not surprising to find that section 135, Criminal Code, when carefully analyzed, shows an intent on the part of Congress to go as far back as can *safely* be done in punishing attempts to interfere with the course of justice in Federal courts, and there is no reason of public policy which should induce this court not to give a liberal construction to the language of the section in order to carry out that intent, provided the defendant be not punished for acts which were so trivial and remote as not to be justly noticeable by the law.

As to the first part of section 135, on which the first count of the indictment was based, it should be noted:

1. That the statute uses the word "endeavor," and while one of the synonyms of this word is "attempt," it nevertheless has a shade of meaning more favorable to an earlier stage in the causal series than "attempt."

2. The consummated offense toward which the "endeavor" is directed is not the bribery or corruption of the court or jury or witnesses but the "influencing" of them. To "influence" is to produce an effect upon, to disturb, to move, as a stone thrown into the water which stirs its surface and muddies its depths. Thus the consummated offense which section 135 has in mind is itself (in a sense) prelimi-

nary or merely significant of the real corruption or poisoning of the sources of public justice which is the evil actually dreaded. But so sensitive is the subject matter deemed by the law that the statute punishes, not merely the agitation of the courts out of their true orbit, but even an "endeavor" to bring about such a result.

We claim, therefore, that cases which have held certain acts to be mere "preparations" and not therefore "attempts," even if they were correctly decided, are not controlling as to a statute containing such language as is in section 135. Neither are cases controlling, even if correctly decided, which hold that an "attempt" must be something which would have succeeded were it not for causes extraneous to the actor; for when it comes to an "endeavor" to "influence" a juror or a court, mere ground baiting, or dropping the net may be enough to satisfy the statute, though to catch the fish would require more which in fact was never done.

Giving the statute the construction claimed above, what are the facts of the present case as charged in the indictment? In the first place defendant went to the juror's house and made his remarks to the juror's wife. It must be assumed on demurrer that the wife would repeat the remarks to the juror—that the wife and husband are one *pro hac vice*—and therefore that the case is the same, on demurrer, as though the defendant had made the remarks to the juror himself at his residence. On

this assumption the indictment must be taken to allege that the defendant went to the juror's residence and inquired of him what his attitude would be towards the defendants in the *Haywood case*, stating, as his reason for the inquiry, that the defendants in that case did not wish to pay any money to the jurors unless they knew the jurors so paid would favor their acquittal.

In the second place, making the above assumption, the words so uttered by the defendant must be construed, on demurrer, as an offer to pay money to the juror if he would be favorable to the acquittal of the defendants in the pending prosecution, for the reason that such a construction could reasonably be placed upon the words by a jury, whose action within their proper sphere must not be forestalled by final disposition of the case on demurrer.

On analysis, therefore, it appears that the question in the case at bar is whether an offer to bribe a juror in a pending cause is an "endeavor" to "influence" him within the meaning of section 135, Criminal Code, or an "obstructing" or "impeding" of justice within the meaning of the same section.

It is difficult to see how there can be any doubt that it is both of these things. It is settled that the juror or court need not be in fact influenced in the manner intended. In *State* v. *Carpenter* (20 Verm. 9, 12), the court said:

> To thwart or obstruct the due administration of justice by violence, bribery, threats, or other lawful means, whether in preventing the

attendance of witnesses, jurymen, or other officers of court, is a high handed offense, which strikes at the vitals of judicial proceedings, and subjects to severe animadversion in every well ordered community. The attempt to commit such an act, it is well settled, is itself a substantive offense, punishable by the common law.

In this instance, the attempt was unsuccessful; the witness, Warren, attended court and testified before the grand jury, as he had bound himself by recognizance to do. Moreover, the parties, against whom he appeared, must be taken to have been innocent of the crime imputed to them; and, in addition to this, the indictment against them, if in the description of the offense it followed the complaint preferred before the magistrate, I am inclined to think was fatally defective. Still, all these circumstances are entirely consistent with the respondent's guilt.

In *Walsh* v. *The People* (65 Ill. 58, 60) the court said:

Why is the mere unsuccessful attempt to bribe criminal? The officer refuses to take the offered reward, and his integrity is untouched—his conduct uninfluenced by it. The reason for the law is plain. The offer is a sore temptation to the weak or the depraved. It tends to corrupt, and, as the law abhors the least tendency to corruption, it punishes the act which is calculated to debase, and which may affect prejudicially the morals of the community.

To the same effect is *Commonwealth* v. *Murray* (135 Mass. 530, 532) and other cases which might be cited. The rule is as ancient as it is well settled. In *Rex* v. *Vaughan*, *supra*, Lord Mansfield cited *Coke's 3 Institute* 147, for the statement:

> If a party offers a bribe to a judge, meaning to corrupt him in a case depending before him; and the judge taketh it not; yet this is an offense punishable by law, in the party that offers it.

(And see *Light's Case* (1915), 11 Crim. App. Cas. 111, 113.)

Sounding a juror as to his susceptibility to bribery is an "endeavor" to "influence" him, though nothing more be done, for it is an endeavor to muddy the waters, which is sufficient. It is not the escape of the particular criminal which the law is afraid of, but the injury to public justice in general if jurors are tampered with. It is only necessary to imagine numbers of persons approaching each of the jurors in a cause with conversations about their attitude toward the parties, innuendoes as to what they might expect if they decided one way or another, etc., to see the necessity for making the approach to jurors without legitimate excuse unlawful, as section 135, Criminal Code, does. Therefore, a conversation with a juror (or a juror's wife) about the payment of money to those jurors voting a certain way is both an endeavor to influence the juror, and an actual influencing of the *due* (i. e., proper) *administration* of justice.

Certain recent English cases furnish examples which may aid, although every case depends somewhat on the particular facts, the statute under consideration (if there be a statute), and the nature of the crime an attempt to commit which is charged.

In England the definition given by Stephen in Chapter V, article 49 of his *Digest of Criminal Law* seems to be approved by the judges:

> An attempt to commit a crime is an act done with intent to commit that crime; and forming part of a series of acts which would constitute its actual commission if it were not interrupted.
>
> The point at which such a series of acts begins can not be defined; but depends upon the circumstances of each particular case.

It will be noted, however, that the latter paragraph of this definition leaves the main difficulty unsolved.

In *Laitwood's case* (1910), 4 Crim. App. Cas. 248, the defendant was indicted for attempting to obtain money under false pretenses. He represented to I that he had an established business, where there was a good opening for a young man, but that an applicant for a situation with it would have to invest £100 in the debentures of the company. He made no further attempt to get, nor did he get the money. The court held that while the case was near the line the defendant was rightly convicted. In this case the Draft Code definition of an attempt is quoted as follows:

> An act done or omitted with intent to commit that offense forming part of a series of acts or omissions which would have constituted

> the offense if such a series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offense or by some other cause.

It will be observed that this Draft Code definition (which was adopted by the court in *Laitwood's case*) clarifies Stephens's definition by including, as one of the causes of the failure of the attempt "the voluntary determination of the offender."

This, though contrary to the statement of Chief Justice Field in *People* v. *Murray* (14 Calif. 159, 160) seems to be in accordance with the view of Justice Holmes as expressed in the opinion of the court in *Commonwealth* v. *Peaslee* (177 Mass. 267, *supra*).

In *White's case* (1910), 4 Crim. App. Cas. 257, 271, the defendant had put a glass containing 2 grains of cyanide of potassium by his mother's couch, but, though she was found dead, she had not taken the poison, nor would 2 grains be sufficient to kill. He was held rightly convicted of an attempt to murder. The court said:

> There seems no doubt that the learned judge in effect did tell the jury that if there was a case of slow poisoning the appellant would be guilty of the attempt to murder. We are of opinion that this direction was right, and that the completion of one of a series of acts intended by a man to result in killing is an attempt to murder, even although this completed act would not, unless followed by the other acts, result in killing. It might be the

beginning of the attempt, but would none the less be an attempt.[1]

In *Robinson's Case* (1915) 11 Crim. App. Cas. 124 the defendant was convicted of an attempt to obtain money by false pretenses from Lloyd's Insurance Agency. Being insured against burglary, he removed his jewelry from his safe, tied himself and represented to the police that he had been robbed. The deception being immediately discovered, he was arrested. The court, in quashing the conviction, said:

> Now in this case the difficulty is that there is no evidence of any act done by the appellant which ever reached the underwriters. They were the people whose minds were to be affected and who were to be induced to part with their money. There is no evidence of any communication between the appellant and the underwriters or any agent of theirs; the policeman can not be said to have been acting for the underwriters. The truth is that this was preparation of evidence for the commission of the crime, and not a step taken with a view to the commission of the crime. Appellant was preparing the evidence that would be required to give color to the story which he intended falsely to present. If the police had reported the burglary it might well have been that the underwriters would have been satisfied without making further enquiries, but there must have been first some

[1] This case may be compared with *Commonwealth* v. *Kennedy* (170 Mass. 18, *supra*).

> act on the part of the appellant in making a claim upon them. It is there that we think the case fails, and applying the principle of Parke B, we think it was an act remotely leading to the commission of the offense, and not an act immediately connected with it.[2]

Reference, in addition to the above, to three cases in this country as aiding consideration of the case at bar may be pardoned. In *People* v. *Murray* (14 Calif. 159, 160) the defendant was indicted for an attempt to contract an incestuous marriage. He had eloped with his niece and had procured a minister for the marriage, but had gone no further. It was held that these acts were mere preparations and did not constitute an attempt. The decision was placed on the rule referred to above as too narrow according to the English authorities, viz, that there can not be an attempt if there be a *locus poenatentiae*, but it is not certain that the case would not have been rightly decided the same way if a broader rule had been applied. In *United States* v. *Stephens* (12 Fed. 52) the defendant was charged with an attempt to introduce spirituous liquors into Alaska. The defendant in Alaska wrote to a firm of liquor dealers in San Francisco requesting them to ship and send to him in Alaska 100 gallons of whisky. This was held merely a preparation and not an attempt, but the force of the decision is weakened by the court's assumption throughout (12 Fed. 56) that the letter was

[2] This case should be compared with *Commonwealth* v. *Peaslee* (177 Mass. 267, *supra*).

nothing more than an offer to purchase whisky in San Francisco, whereas in fact it was not merely an offer to purchase, but also an order to ship to Alaska. In *State* v. *Hurley* (79 Verm. 28) the defendant was charged with attempting to break jail. A person outside the jail threw to defendant a bundle of hack saws; the defendant got the saws in his hands, but was discovered and ordered to drop the saws by the jailer, which he did. The information was quashed, the court saying:

> The act in question here is the procuring by a prisoner of tools adapted to jail breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he had not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design.

In some of the cases, e. g., *Rex* v. *Taylor* (1 F. & F. 511), a case of attempted arson, the test is said to be whether the acts done are in themselves neutral and of an innocent character, being made evil merely by the intent of the actor; but such a test would not

explain *Robinson's case, supra, People* v. *Murray, supra, State* v. *Hurley, supra,* nor *Commonwealth* v. *Peaslee, supra,* in all of which the acts done showed on their face the crime towards which they were directed, but were held nevertheless to be preparation merely.[3]

The following suggestion may be ventured, on the analogy of the drama. The stage setting, while a condition precedent to the performance of the play, is not itself the play, nor even the beginning of it. But as soon as the curtain rises and the first actor appears the attempt has begun to represent the drama to be completed when the curtain falls, though one or all of the actors may, for one or another reason, refuse to go on. It will be observed that there is a pause after the stage setting is complete, and before the play is begun. It seems that in reality there are two intents (whether conscious or not is immaterial), with appropriate series of acts, although the one is included in and is conditional on the other; viz, the intent to prepare the stage as an independent completed end, and the intent to act the play.

So in real life, where the acts of the person charged with an attempt to commit a defined crime are merely directed to setting the stage, after which a pause is contemplated before the crime itself is attempted,

[3] See also for a discussion of the principles involved *People* v. *Sullivan* (173 N. Y. 122, 133–136), the dissenting opinion of Grant, C. J., in *People* v. *Youngs* (122 Mich. 292, 295, *et seq.*), and the article by Professor Beale on *Criminal Attempts* (16 Harvard Law Rev. 491).

they are merely preparations. Where, however, they are more than this and, coming after the stage is prepared, are the beginning of a series of causes the natural effect of which is the defined crime, they are attempts, though they be merely the first steps in the series. The stage setting, however, may occupy a relatively large field and the play a relatively small one, or vice versa, depending on the nature of the crime, or of the statute creating it. For example, murder by violence is an instant business, though the preparation for it may cover a considerable period. Hence an attempt to commit a violent murder can hardly be said to have begun so long as there is a *locus poenatentiæ*. A man lying in wait with a loaded firearm may still be said to have done nothing more than pave the way. Where, however, the case is one of murder by slow poisoning, the drama itself has several acts, and the placing of a small amount of poison where the victim is likely to take it may be held to constitute an attempt. The distinction here suggested would (we believe) explain most of the cases cited above. If applied to the case at bar, it would (we submit) sustain the indictment. "Influencing" a juror or court is like slow poisoning, not like murder by violence. It is continuous and (more or less) impalpable. The stage setting would be confined to such matters as inquiries about the jurors or court, their character, the best methods of reaching them, etc. When, however, these inquiries have been

finished and communication with the juror or court has been opened, the attempt has begun. It is like communication with the underwriters which was held essential in *Robinson's case, supra.*

There is no repugnancy between the first count, charging an endeavor to influence the juror, and the second count, which charges the obstructing of justice in court, because both might have been done at the same time and by the same conduct, and defendant's conduct might have delayed the court if it did not influence the juror, and it might have influenced the juror without delaying the court, although it is difficult to believe that influencing a juror improperly does not necessarily and always *influence* the administration of justice in the court within the meaning of section 135 of the Criminal Code.

CONCLUSION.

We respectfully submit that the court below erred in the way assigned, that both counts should have been held good upon demurrer; and that the judgment should, therefore, be reversed.

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